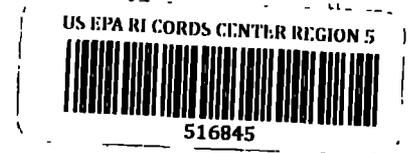


UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION



In re: ) Chapter 11  
)  
Eagle-Picher Holdings, Inc., et al., ) Jointly Administered  
) Case No. 05-12601  
Debtors. )  
) Judge Jeffrey P. Hopkins.

**MOTION BY WILLIAM L. WEST, CUSTODIAL TRUSTEE OF THE EP CUSTODIAL TRUST, TO ENTER AN ORDER AMENDING THE EP CUSTODIAL TRUST TO PROVIDE FOR A TRANSFER OF THE SUM OF \$100,000.00 FROM THE HILLSDALE TRUST ACCOUNT TO THE ADMINISTRATION ACCOUNT OF THE OF THE EP CUSTODIAL TRUST**

With this *Motion by William L. West, Custodial Trustee of the EP Custodial Trust, to Enter an Order Amending the EP Custodial Trust to Provide for a Transfer of the Sum of \$100,000.00 from the Hillsdale Trust Account to the Administration Account of the EP Custodial Trust* ("Motion"), the Custodial Trustee seeks to transfer \$100,000.00 from the Hillsdale Escrow Account (hereafter defined) to fund the Administration Account of the EP Custodial Trust in order to continue the remediation of the Industrial Drive Property in Hillsdale, Michigan ("Hillsdale Site").

This transfer is needed so that the Custodial Trustee -- with the oversight and consent of the State of Michigan --- can continue to remediate the Hillsdale Site. Without this transfer, the EP Custodial trust will not have sufficient funds for administration, putting the Trust's performance of its essential purposes in jeopardy. Such a result is not in the best interests of the Custodial Trust and the State of Michigan, or in accord with the intentions by the parties to the Custodial Trust.

A Brief in Support of the Motion is attached hereto together with a proposed Order granting this Motion.

Respectfully submitted,

/s/ M. Colette Gibbons

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*Counsel to the Custodial Trustee*

**BRIEF IN SUPPORT**

**I. BACKGROUND**

1. On April 11, 2005, EaglePicher Holdings, Inc. and certain of its affiliates (the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio which cases have been jointly administered under Case No. 05-12601.

2. MDEQ filed a claim and asserted that Eagle Picher still had obligations to address environmental contamination at its facilities located in Michigan.

3. To resolve the claims and contentions of Michigan, along with the United States Environmental Protection Agency and several other states, the Debtors agreed to the establishment of a Trust to own, manage, lease and/or to fund Environmental Actions at those properties that were no longer used by the Debtors in their operations or were used by the Debtors as Transitional Properties under a lease from the Custodial Trust. Under the terms of the Michigan Settlement Agreement, the Michigan Department of Environmental Quality waived any other rights of recovery.

4. On June 28, 2006, the Bankruptcy Court issued an *Order Confirming the Debtor's Second Amended Plan of Reorganization* (ECF No. 2189) which, among other things, approved the transfer of certain environmentally contaminated sites located in the states of Illinois, Oklahoma, Kansas, Michigan and Ohio to the Custodial Trust, to be administered by the Custodial Trustee pursuant to the EP Custodial Trust Agreement ("Trust Agreement") and the various Settlement Agreement which were expressly approved by the terms of the Plan. The Trust Agreement (attached as Exhibit A to ECF No. 3507) provides that the funding of the EP Custodial Trust ("Trust") would be accomplished in part by cash and the issuance of certain Letters of Credit. See Exhibit B to the Trust Agreement which sets forth the amounts of cash

funding and amounts of Letters of Credit issued by EaglePicher Corporation (n/k/a or succeeded by EPMC Holdings Corporation or "EPMC") attached hereto as Exhibit 1.

5. The Trust Agreement in Section 2.4 allows for the distribution of Overfunding or Residual Interests from a Custodial Trust Account when all Environmental Action with respect to the property held in such account was completed or a determination was made that the account held funds in excess of that needed to complete the Environmental Action.

6. Section 2.2 of the Trust Agreement provides the method of funding the Trust. The Custodial Trustee is permitted to draw on the Letters of Credit as follows:

2.2(c) The Custodial Trustee shall apply Custodial Trust Assets from time to time held in the Custodial Trust Accounts to pay the costs of Environmental Actions related to the Properties associated with such Custodial Trust Accounts, the administrative costs of the Custodial Trust, and for other purposes set forth herein, the Plan, the Confirmation Order, and in the Settlement Agreements. To the extent any Custodial Trust Account holds cash and one or more letters of credit, the Custodial Trustee shall expend cash, subject to a reasonable reserve, before drawing on any letters of credit and shall draw on the letters of credit only to the extent needed to pay Environmental Costs and administrative costs projected to be incurred over the next year; provided, however, if the Custodial Trust receives notice from an issuer of a letter of credit or otherwise determines that such letter of credit will not be renewed, or a letter of credit is not automatically renewed within the time provided in the letter of credit, then in any such case the Custodial Trustee shall draw the then remaining amount of such letter of credit and deposit the proceeds in the designated Custodial Trust Accounts. The Custodial Trustee shall not be required to use amounts held in the Administration Custodial Trust Account for the costs of Environmental Actions. Further, except as expressly provided in the Settlement Agreements, administrative costs that are not Environmental Costs may be paid only from the Administration Custodial Trust Account and may not be paid from the Custodial Trust Accounts for Environmental Costs related to those accounts.

7. As of February 28, 2013, the amounts in the Letters of Credit were as follows:

Property	Amount @ 02/28/2013
Galena, IL	\$ 70,000.00
Galena, KS	\$4,000,000.00
Hillsdale MI	\$ 880,827.00
Miami, OK	\$ 33,160.00
Sidney, OH	\$ 237,500.00
TOTAL	\$5,221,487.00

8. By *Agreed Order Resolving Motion of EPMC Holdings Corporation for Approval of Substitution of Cash Collateral for Letters of Credit Under the EP Custodial Trust Agreement and Objections Thereto* ("Agreed Order") dated March 28, 2013, the Trust Agreement was modified to provide for the substitution of Escrow Accounts for Letters of Credit [ECF No. 3523]. Paragraph 4 of the Agreed Order states as follows:

Each Property Account shall be treated the same as a letter of credit for purposes of the Custodial Trust Agreement. Without limiting the generality of the preceding sentence, (i) funds in each Property Account may only be used to pay for Environmental Actions (as defined by the Custodial Trust Agreement) at the above-referenced properties associated with the applicable Property Account, (ii) the Custodial Trustee shall first expend cash in a Custodial Trust Account, subject to a reasonable reserve, before drawing funds from a Property Account, (iii) the Custodial Trustee shall draw funds from a Property Account in accordance with the terms of the Custodial Trust Agreement and will remit funds from a Property Account to EPMC in accordance with the terms of the Custodial Trust.

The Agreed Order also provided for the termination of the Sidney, Ohio Letter of Credit in the amount of \$237,500.00 because the remediation in Sidney by the Custodial Trustee was complete. The effect of this termination of the Sidney, Ohio Letter of Credit is that EPMC

received whatever collateral was in place for the Sidney Letter of Credit and had no further liability to fund remediation at the Sidney, Ohio site.

9. Subsequent to the Agreed Order, the Court entered an Order Granting a Motion to by the Custodial Trustee to 1) Terminate the Custodial Trust for the Galena, IL Property and 2) Distribute Funds to EPMC Corporation pursuant to Agreed Order Resolving Motion (Galena, IL Order") [ECF No. 3532]. Per the Galena, IL Order, the sum of \$67,500.00 was returned to EPMC on the termination of the Galena, IL Escrow Account because the Trustee had completed all remediation at the Galena, IL site.

10. No sums were returned to EPMC on the termination of the Galena, KS Trust or on the termination of the EPI Michigan accounts as all sums in the Galena, KS Letter of Credit were drawn down by the Custodial Trustee and used to remediate the Galena, KS site. Similarly, all funds in the EPI Michigan Letter of Credit were drawn down by the Custodial Trustee and used to remediate the Inkster site and the River Rouge site.

11. By filing with this Court on March 30, 2015, the Custodial Trustee filed his Annual Report for 2014 [ECF No. 3550] ("2014 Annual Report"). There remain four properties in the Trust as follows:

1. 221 Industrial Drive, Hillsdale, Michigan
2. 215 Industrial Drive, Hillsdale, Michigan
3. 200 BJ Tunnel, Miami, Oklahoma; and
4. South Street, Hillsdale, Michigan.

Remediation on all other Trust properties has been completed and/or the properties have been sold to third parties and/or abandoned by the Custodial Trustee pursuant to Order by this Court.

12. The following amounts remain in Escrow Accounts pursuant to the Escrow Agreement approved in the Agreed Order:

1. \$606,485.00 remains in the Hillsdale Escrow Account; and
2. \$8,074.00 remains in the Miami, OK Escrow Account.<sup>1</sup>

13. As is evident from the Letter Agreement between the State of Michigan and the Custodial Trustee, a copy of which is attached hereto as Exhibit 2, the Custodial Trustee expects to draw down \$482,700.00 of the remaining sums in the Hillsdale Trust in calendar year 2015.

14. Additionally, Exhibit 3, an estimate by the contractor for the Trustee, indicates that at least \$330,000.00 more would need to be spent to completely remediate the Hillsdale property. In other words, remediation costs for the Hillsdale Site exceed the amount in the Hillsdale Trust by over \$194,900.00. Thus all of the remaining trust funds are needed to cover remediation expenses. However, as set forth below, the Custodial Trustee does not have the funds to cover the administrative expenses associated with accomplishing that remediation, and the Trust documents are silent as to how to proceed.

15. As indicated in the Annual Report filed by the Custodial Trusts in 2009, 2010, 2011, 2012, 2013 and 2014<sup>2</sup>, the Custodial Trustee has advised this Court and all of those affected by the Custodial Trust that the Administration Account was grossly underfunded because property tax projections for the Custodial Trust properties were low and incorrect.

16. While the estimated costs for remediation of the Hillsdale Site exceed the amount in the Hillsdale Trust, there is only \$3,981.89 in the Administration Account.

17. After discussing this issue with the State of Michigan, Michigan has agreed to support the transfer of \$100,000.00 from the Hillsdale Escrow Account to the Administration

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<sup>1</sup> The Custodial Trustee is working with a prospective buyer for the Miami, OK property.

<sup>2</sup> BCF Nos. 3227, 3400, 3455, 3522, 3545 and 3550.

Account to pay for the administrative costs relative to the remediation of the Hillsdale Site because the State of Michigan wants remediation by the Custodial Trustee to continue. *See* Exhibit 2.

## II. ARGUMENT

### A. The Court Should Approve The Proposed Transfer.

18. As noted above, the text of the EP Custodial Trust does not indicate what should happen if there are adequate funds in the Trust Account to continue remediation efforts contemplated by the State and EP Custodial Trust but inadequate funds in the Administration Account to make that remediation occur.

19. Based on all the facts of this case, the purpose of the Custodial Trust, and the law and analysis provided below, the Custodial Trustee urges this Court to approve the transfer of \$100,000 from the Hillsdale Escrow Account to the Administration Account.

20. A fundamental tenet of the construction of trust documents under Ohio trust law is that "A court's purpose in interpreting a trust is to effectuate, within the legal parameters established by a court or by statute, the settlor's intent." *Domo v. McCarthy*, 66 Ohio St.3d 312, 612 N.E.2d 706 (1993), paragraph 1 of the syllabus. The clear intention of the Custodial Trust was to provide for the remediation of contaminated sites that had been owned by the Debtor. Here, if the Administration Account is not funded, remediation will not be able to continue, even though funds are available in the Hillsdale Escrow Account to accomplish further remediation of the site, which is the essential purpose of the Custodial Trust.

21. The Custodial Trust prohibits use of Trust Funds for Administration purposes. However, where the beneficiary of the prohibition on the use of Trust Funds for Administration purposes agrees that a portion of the Trust Funds may be used for Administration purposes in order that the purposes of the Custodial Trust may continue to be carried out, the Court should

construe that beneficiary's (in this case the State of Michigan) wishes as superseding the limitation on the use of trust funds.

22. Even if the Court concluded that this use of Trust Funds is prohibited by the terms of the Custodial Trust, it should approve the proposed transfer of funds under the doctrine of deviation. As the Supreme Court of Ohio has explained, under the doctrine of deviation, a court can "direct or permit a deviation from the terms of the trust where compliance is impossible or illegal, or where owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust." *Daloia v. Franciscan Health Sys. Of Cent. Ohio, Inc.*, 79 Ohio St.3d 98, 106-107, 679 N.E.2d 1084 (1997). The doctrine of deviation has to do with the administration of the trust – that is, the methods by which the purposes of the trust are accomplished. *Id.* at 106-107. Thus, a court applying the doctrine cannot change the objective of the trust or divert the bequest to an entity with a different purpose than the purpose set forth in the trust instrument. Rather, the doctrine of deviation applies where following the express terms of the trust will frustrate the purpose of the trust. *Id.* That is precisely the case here.

23. In *Daloia*, the court considered a trust that was established, in part, to contribute money to a medical center in Columbus to carry out its mission of providing health care to the sick and poor. That medical center was subsequently sold, and it was proposed that the funds be used to support a similar facility in Dayton. The court held that there was no intention expressed in the trust that the funds be used solely in the Columbus area. Rather, the primary purpose of the gifts at issue was to provide healthcare for the poor. The court held that, although the sale of the hospital named in the trust made it impossible to comply with the express terms of the trust, the settlors' intentions to have the funds used to provide healthcare to the poor were clear, and

that giving the funds to a hospital with an identical mission statement to the original recipient accorded with the purpose of the trust, to ensure that it fulfilled its primary purpose. 79 Ohio St.3d at 107-108.<sup>3</sup>

24. Indeed, in situations similar to this one, courts have applied the doctrine of deviation in order to ensure that trust funds may be used to further the purposes of the trust rather than revert to successors of the settlor. See, e.g., *Bank One Trust Co., N.A. v. Miami Valley Hosp.*, 2<sup>nd</sup> Dist. Montgomery No. 19703, 2003-Ohio-4590, ¶14-17. In that case, a trust named three hospitals as beneficiaries. When one of the hospitals ceased operations, the heirs of the settlor argued that they were entitled to the share of the failed hospital. The other two hospitals argued that they should each receive a pro rata portion of the closed hospital's share. The court held that the doctrine of deviation was properly invoked to allocate funds to the two remaining hospitals, rather than the heirs, because that result was most consistent with the settlor's intent.

25. The doctrine of deviation even authorizes the Court to direct or permit the Custodial Trustee to do acts would be forbidden by the express terms of the trust. *Dollar Savings and Trust Co., Swanston v. Brown*, 7<sup>th</sup> Dist. Mahoning No. 80-CA-76, 1981 WL 4731, \*7.

26. These principles were codified by the Ohio General Assembly in 2006 when it adopted the Uniform Trust Act. In particular, Section 412 of the Uniform Trust Code, O.R.C. 5804.12, confirms the authority of the Court to grant the relief requested herein. In particular O.R.C. 5804.12(A), authorizing modification of either the administrative or dispositive terms of a trust due to circumstances not anticipated by the settlor where such modification will further the purposes of the trust. Section 5804.12(B) authorizes modification of the administrative terms

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<sup>3</sup> The court also made clear that, unlike the doctrine of *cy pres*, the doctrine applies to private as well as charitable trusts. 79 Ohio St.3d at 107.

of a trust where continuing the trust on its existing terms would be impractical or impair the trust's administration, and 5804.12(D), authorizing interpretation and modification of trust to give effect to the intent of the settlor.<sup>4</sup>

27. Here, the doctrine of deviation should be applied. It has become impossible to carry out the purposes of the Custodial Trust because the Administration Account was underfunded from the beginning, a circumstance that was not anticipated at the time the Custodial Trust was created. Moreover, since there are still Trust Funds remaining, strictly applying the terms of the Trust to deny use of a small portion of the Trust Funds to cover administrative expenses would defeat or substantially impair the accomplishment of the purposes of the trust. Accordingly, under the doctrine of deviation, the transfer of funds should be approved.

28. Indeed, the deviation sought here is significantly less of a change in the terms of the trust than in the cases cited above. The Custodial Trustee is not seeking a change in the beneficiary of the terms of the Custodial Trust. Rather, with the concurrence of the beneficiary of the Hillsdale Trust, the Custodial Trustee seeks to reallocate a small portion of the Trust Funds so that the Trust's purposes can be carried out. It should be noted that if the agreement is not approved, there will be no alternative but for the Custodial Trustee to resign leaving the Custodial Trust and the Environmental Action at the Hillsdale property in jeopardy. Ohio law provides that a trust should not be terminated when to do so would defeat a material purpose of the trust. *Carnahan v. Johnson*, 127 Ohio App.3d 195, 200-201, 711 N.E.2d 1093 (12<sup>th</sup> Dist. 1998).

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<sup>4</sup> Although the adoption of the Uniform Trust Code did not take effect until January 1, 2007, after the Effective Date of the Custodial Trust, O.R.C. 5811.03(A)(1) provides that "Chapters 5801. to 5811. of the Revised Code apply to all trusts created before, on, or after their effective date."

**B. The Court should approve an Amendment to the Custodial Trust to provide for funding the Administration Account.**

29. In the alternative, the Court may approve an Amendment to the Custodial Trust.

The Custodial Trust may be amended pursuant to paragraph 6.11 of the Custodial Trust which states as follows:

6.11 Amendment of Trust.

(a) The provisions of this Agreement related to specific Custodial Trust Accounts may be amended by the mutual agreement of the Custodial Trustee, the Plan Trustee and the Agency Beneficiaries with an interest in such Custodial Trust Accounts without Court approval. Absent consent of the required parties, provisions of this Agreement related to specific Custodial Trust Accounts may be amended pursuant to the procedures set forth in Section 6.11(b).

(b) Administrative provisions of general application may be amended only after providing notice and an opportunity to object as set forth herein. The Custodial Trustee shall provide written notice of his intention to amend this Agreement to the Plan Trustee and Environmental Agencies (the "Amendment Notice Parties"), who shall have twenty (20) days after the date of receipt of such written notice to object (the "Amendment Objection Period") to the proposed amendment. The Custodial Trustee may proceed to make the proposed amendment upon the expiration of the Amendment Objection Period unless, prior to the expiration of such period, it receives a written notice of objection from one of the Amendment Notice Parties. If the Custodial Trustee receives one or more objections, it may make such amendment only (i) after all timely and proper objections are withdrawn and notice of such withdrawal has been provided to the Amendment Notice Parties, or (ii) upon order of the Court.

30. Paragraph 2.2(c) of the EP Custodial Trust should be amended (as in bold type below) to read:

The Custodial Trustee shall apply Custodial Trust Assets from time to time held in the Custodial Trust Accounts to pay the costs of Environmental Actions related to the Properties associated with such Custodial Trust Accounts, the administrative costs of the Custodial Trust, and for other purposes set forth herein, the Plan, the Confirmation Order, and in the Settlement Agreements. To the extent any Custodial Trust Account holds cash and one or more letters of credit, the Custodial Trustee

shall expend cash, subject to a reasonable reserve, before drawing on any letters of credit and shall draw on the letters of credit only to the extent needed to pay Environmental Costs and administrative costs projected to be incurred over the next year; *provided, however*, if the Custodial Trust receives notice from an issuer of a letter of credit or otherwise determines that such letter of credit will not be renewed, or a letter of credit is not automatically renewed within the time provided in the letter of credit, then in any such case the Custodial Trustee shall draw the then remaining amount of such letter of credit and deposit the proceeds in the designated Custodial Trust Accounts. The Custodial Trustee shall not be required to use amounts held in the Administration Custodial Trust Account for the costs of Environmental Actions. Further, except as expressly provided in the Settlement Agreements, administrative costs that are not Environmental Costs may be paid only from the Administration Custodial Trust Account and may not be paid from the Custodial Trust Accounts for Environmental Costs related to those accounts, *provided, however, for good cause shown, upon Motion of the Custodial Trustee and with the consent of the State, the Court may authorize transfer of funds from the Custodial Trust Account to the Administration Account if the good faith estimate of the cost of the Environmental Actions exceeds the amount in the Custodial Trust Account.*

31. As set forth above, the Court would have the power to modify the Custodial Trust even without the provisions of Section 6.11. However, Section 6.11 provides a mechanism by which the Custodial Trust can be modified to address the present circumstances. Section 6.11 does not provide guidance as to the criteria by which the Court should evaluate a proposed amendment, but the Court's approval of a proposed amendment to the Custodial Trust should be informed by whether or not the amendment will serve the purposes of the trust or avoid a failure of a material purpose of the trust. *See* O.R.C. 5804.12(A)-(B). As demonstrated above, it would be a material failure of the purpose of the Custodial Trust to stop remediation at the Hillsdale Site at a time when there are significant Trust Funds on hand and remediation is not complete but cannot go forward due to a lack of funds to cover administrative expenses. Accordingly, the Court should amend the Custodial Trust as set forth above.

### III. CONCLUSION

For the reasons stated above, the Motion should be granted.

Dated: April 20, 2015

Respectfully submitted,

/s/ M. Colette Gibbons

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*Counsel to the Custodial Trustee*

**NOTICE OF MOTION BY WILLIAM L. WEST, CUSTODIAL TRUSTEE OF THE EP CUSTODIAL TRUST, TO ENTER AN ORDER AMENDING THE EP CUSTODIAL TRUST TO PROVIDE FOR A TRANSFER OF THE SUM OF \$100,000.00 FROM THE HILLSDALE TRUST ACCOUNT TO THE ADMINISTRATION ACCOUNT OF THE OF THE EP CUSTODIAL TRUST**

William L. West, Custodial Trustee Of The EP Custodial Trust, has filed a Motion To Enter An Order Amending The EP Custodial Trust To Provide For A Transfer Of The Sum Of \$100,000.00 From The Hillsdale Trust Account To The Administration Account Of The Of The EP Custodial Trust.

**Your rights may be affected.** You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. If you do not have an attorney, you may wish to consult one.

If you do not want the court to grant the relief sought in the motion/objection, then on or before **twenty-one (21) days from the date set forth in the certificate of service for the motion**, you must file with the court a response explaining your position by mailing your response by regular U.S. Mail to the Clerk, United States Bankruptcy Court, Southern District of Ohio, Western Division, 221 East 4<sup>th</sup> Street, Atrium Two Suite 800, Cincinnati, Ohio 45202 OR your attorney must file a response using the court's ECF System.

The court must receive your response on or before the above date.

You must also send a copy of your response either by 1) the court's ECF System or by 2) regular U.S. Mail to M. Colette Gibbons, Ice Miller LLP, 600 Superior Avenue, East, Suite 1701, Cleveland, OH 44114, such as to be received on or before the date stated above.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion/objection and may enter an order granting that relief without further hearing or notice.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing *Motion by William L. West, Custodial Trustee of the EP Custodial Trust, to 1) Enter an Order Approving the Agreement between Michigan and the Custodial Trustee, or, in the Alternative 2) to Enter an Order Amending the EP Custodial Trust to Provide for a Transfer of the Sum of \$100,000.00 from the Hillsdale Trust Account to the Administration Account of the EP Custodial Trust* was filed electronically this 20<sup>th</sup> day of April, 2015. Notice of this filing will be sent to all parties via the Court's electronic filing system. Parties may access this filing through the Court's system.

In addition, the following parties were served *via* Federal Express:

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**The following parties were served *via* United States Certified Mail:**

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Environmental Services  
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International Center Bldg  
Detroit, MI 48226

Shelby County Commissioners Office  
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Sidney, OH 45365

Official in Charge  
Cherokee County, Kansas  
110 W. Maple  
Columbus, KS 66725

/s/ M. Colette Gibbons

M. Colette Gibbons

CL\240206.11

**EP CUSTODIAL TRUST AGREEMENT**  
**EXHIBIT B**

Settlor	Custodial Trust Account	Properties	Cash Funding		Lease Funding	Funding
			Cash	Letter of Credit		
Settlers	Administration	N/A	\$760,700.00	\$2,180,000.00	\$0.00	\$2,940,700.00
EPT	Hockerville	See Exhibit A.1	\$105,000.00	\$0.00	\$0.00	\$105,000.00
EPT	Miami	See Exhibit A.2	\$314,000.00	\$33,160.00	\$252,840.00	\$600,000.00
EPT	Galena, KS	See Exhibit A.3	\$205,000.00	\$6,355,000.00	\$0.00	\$6,560,000.00
EPT	Baxter Springs	See Exhibit A.4	\$349,000.00	\$0.00	\$0.00	\$349,000.00
EPT	Columbus	See Exhibit A.5	\$282,000.00	\$0.00	\$0.00	\$282,000.00
EPI	Galena, IL	See Exhibit A.6	\$680,000.00	\$470,000.00	\$0.00	\$1,150,000.00
EPI	Sidney	See Exhibit A.7	\$550,000.00	\$530,000.00	\$0.00	\$1,080,000.00
EPI	Urbana	See Exhibit A.8	\$45,000.00	\$0.00	\$0.00	\$45,000.00
EPI	EPI MI	See Exhibit A.9-A.10	\$549,999.86	\$998,090.00	\$651,910.14	\$2,200,000.00
Hillsdale Debtors	Hillsdale MI	See Exhibit A.11-A.13	\$426,000.02	\$1,688,827.00	\$285,172.98	\$2,400,000.00
<b>TOTAL</b>			<b>\$4,266,699.88</b>	<b>\$12,255,077.00</b>	<b>\$1,189,923.12</b>	<b>\$17,711,700.00</b>

**William L. West**  
**EP Custodial Trustee**  
26734 Jefferson Court  
Bay Village, Ohio  
Phone 440-871-2493  
Cell Phone 216-496-4767  
Fax 440-871-8767  
Email [wjwest@ameritech.net](mailto:wjwest@ameritech.net)

April 3, 2015

Mr. Leonard Lipinski  
Compliance and Enforcement Section  
Remediation and Redevelopment Division  
Michigan Department of Environmental Quality  
525 West Allegan Street  
Lansing, MI 48933-2125

Subject: Follow-up Letter from March 17, 2015 Meeting

Dear Mr. Lipinski:

On March 17, 2015, representatives of the Michigan Department of Environmental Quality (MDEQ), the EP Custodial Trust, and Civil & Environmental Consultants, Inc. (CEC) met at your offices to discuss the status of the Custodial Trust and future remedial plans for the EP Custodial Trust site located at 215/221 Industrial Drive in Hillsdale, Michigan. One of the topics of discussion was the future status of the administrative fund for the continued management of the Hillsdale project. The following letter has been prepared to provide 1) a summary of the efforts taken to-date to address soil and groundwater contamination at the site, 2) a description of current plans for additional remedial efforts and 3) a proposal to replenish the funding for the administrative fund.

#### Summary of Remedial Efforts

Investigative activities conducted in 2007 and 2008, as approved by MDEQ, did not identify any sources of impact not previously identified by historical investigations. In 2009, CEC further defined the nature and extent of the remaining VOC impact in the source area and downgradient areas.

In 2010, CEC conducted a full groundwater monitoring event and performed a soil vapor extraction (SVE) pilot test using shallow extraction points installed in the source area for this purpose. A Remedial Program Work Plan Addendum outlining the implementation of an in-situ chemical oxidation program to remediate groundwater and a soil vapor extraction system to remediate soil was prepared and submitted to the MDEQ in November 2010.

In April 2010, a SVE pilot test was performed in the source area using a nine shallow formation extraction points. Various extraction configurations were evaluated along with various vacuum levels and flow rates during the first day of the test. The pilot system was then allowed to run on all nine extraction wells for one week. Samples of the effluent were collected with each

configuration and laboratory analyzed for VOCs. The results of the pilot test indicated good communication between extraction wells, exhibiting a radius of influence exceeding 10 feet. The test results also indicated that approximately 17 kg of TCE, at an average of 2.4 kg/day, was removed from the shallow formation during the one week test. As a result, SVE was determined to be an effective remedial option for the shallow vadose zone, but was ruled out as a priority until the nature and cost of the groundwater remediation efforts could be evaluated.

In May 2011, CEC submitted a revised Remedial Program Work Plan Addendum presenting the overall rationale for conducting a pilot study for in-situ chemical oxidation using alkaline-activated sodium persulfate. Following an August 2011 meeting with the MDEQ to review the revised work plan addendum, CEC began designing the pilot testing program.

In February 2012, CEC completed and submitted an Interim Response Work Plan for Pilot Testing and Part 22 Permit Exemption for Remedial Discharge. After receiving approval of the exemption from the MDEQ in June, CEC began preparations for the installation of the alkaline-activated sodium persulfate pilot test injection and extraction wells. Samples of the soil/rock and groundwater were collected during the advancement of the injection and extraction wells for laboratory analysis to establish baseline conditions and for quantitative bench-scale oxidant testing.

In May 2013, CEC conducted a full groundwater monitoring event to serve as the pre-treatment baseline in accordance with the MDEQ-approved Interim Response Work Plan for Pilot Testing and Part 22 Permit Exemption for Remedial Discharge. CEC conducted the pilot injection of alkaline-activated sodium persulfate in May 2013. The pilot test showed conditions to be favorable to implementing remediation using this method, but it also confirmed that high doses of oxidant would be required which would have accounted for nearly all of the available funding. Based on the results of the pilot test, CEC continued to evaluate the feasibility of soil vapor extraction and air sparge (SVE/AS) as a remedial alternative, potentially in conjunction with the injection of chemical oxidants or a bio-enhanced reductive dechlorination.

In July and August 2013, CEC collected samples from 14 existing monitoring wells in the source area to monitor groundwater conditions throughout the injection pilot test area. The data indicated mixed results, with some locations showing a temporary increase in VOC contamination believed to be associated with the surfactant-like properties of the injected alkaline material combined with insufficient volume of sodium persulfate, while other locations did show evidence of a decrease in contaminant levels.

In May 2014, a SVE/AS pilot test was performed in the source area using a series of deeper formation extraction points. Various extraction and sparging configurations were evaluated along with various vacuum levels and flow rates. Samples of the effluent were collected with each configuration and laboratory analyzed for VOCs. The results of the pilot test indicated a fair amount of contaminant mass was extracted from the formation; however, air sparging proved to be ineffective and vacuum communication between wells was poor. As a result, SVE was determined to be somewhat effective as a remedial option for the vadose zone, but air sparge was ruled out as an option for the saturated zone.

In summary, we believe that in-situ, bio-enhanced remediation of groundwater in the vicinity of the source area is feasible and we are currently evaluating options for this methodology. In addition, we believe that soil vapor extraction may also have some effectiveness in addressing residual contaminants in unsaturated soil at the site.

### Current Remedial Plan

While the chemical oxidation method employed during the pilot test provided some measureable benefit to groundwater quality, the need for larger quantities of reactant and the rapid consumption of the sodium persulfate suggests that the method may require multiple larger scale injection events to approach project goals. As a result, this method does not likely provide a good value for the limited remaining funds in the Trust and has been ruled out as an effective method for this site.

The contaminants present at the site are known to be amenable to remediation using anaerobic bio-attenuation methodologies. Bio-attenuation remedial methods have the advantage over chemical reactive methods in that they utilize existing, or enhanced, colonies of indigenous bacteria to provide long-term remediation of contaminants. The method simply improves subsurface conditions for the bacterial colonies to thrive and biologically breakdown contaminants. As a result, enhancing subsurface conditions for the indigenous bacteria will allow them to breakdown site contaminants for a much longer period of time as compared to a chemical oxidation method which ceases to be effective as soon as the reaction is complete due to consumption of the oxidant chemicals.

Using the findings of the remedial efforts to-date, combined with collective CEC experiences at other contaminated sites, the current remedial plan calls for the implementation of in-situ, bio-enhanced remediation of groundwater using BHC-L provided by Peroxychem, with an option for additional injection of DHC inoculum. The BHC-L material is a cold-water soluble formulation of BHC where the base composition is a controlled-release organic carbon with a food-grade, organo-iron compound. We currently envision utilizing approximately 11 existing wells with a possibility of installing an additional 4-7 wells for more complete coverage of the impacted source area. In addition, by utilizing the existing monitoring wells as injection wells, we may also need to install a limited number of new monitoring wells to evaluate groundwater quality where injection has not directly occurred. A map of the area is provided in Figure 1.

Injection of the BHC-L will be performed using a gravity-feed system after mixing the BHC-L with an appropriate volume of water. Final amounts of BHC-L are yet to be determined, but will be at least 11,300 lbs. of material. If use of DHC inoculum is elected, we anticipate using at least 64 L of material added to the BHC-L mixture. Depending on the results of subsequent groundwater sampling, a follow-up injection of BHC-L may be performed near the end of 2015.

While SVE is not being proposed as the primary remedial approach, a limited SVE system will also be installed and operated on a temporary basis to help remove as much contamination mass as possible. The system envisioned will be a package system rented on a monthly basis and connected to selected, existing wells where contaminant levels are shown to be highest. Off-gas will be treated using activated carbon canisters. The system will be connected using flexible hoses laid across the parking lot to eliminate the cost to bury lines and it would only be operated, and therefore rented, when the temperature is above freezing.

### Conceptual Schedule and Estimated Costs

The conceptual schedule and estimated cost for implementation for the current remedial plan (minus the SVE installation) is provided below:

First Quarter 2015

- (1) Attend MDEQ meeting
- (2) Install bio-traps in selected wells

Estimated Costs: \$10,000

Second Quarter 2015

- (1) Perform biodiversity studies from bio-trap data
- (2) Perform clear water injection test to evaluate possible injection rates
- (3) Finalize type and volume of remedial additives to be used and which wells to inject
- (4) Prepare and submit detailed remedial plan
- (5) Install new injection/monitoring wells, if needed
- (6) Prepare and submit revised injection permit application
- (7) Perform injection of remedial additives into selected wells
- (8) Prepare comprehensive summary report

Estimated Costs:..... \$250,000

Third Quarter 2015

- (1) Monitor groundwater for evidence of remedial additives and VOC breakdown products post-injection

Estimated Costs:..... \$20,000

Fourth Quarter 2015

- (1) Monitor groundwater for evidence of remedial additives and VOC breakdown products post-injection
- (2) Perform follow-up injection of reactant
- (3) Prepare interim summary report

Estimated Costs:..... \$150,000

We estimate that the SVE system could be installed for less than \$7,500, which would cover the cost of an electrical connection and installation of temporary barrier fencing for the treatment area. The SVE unit can be rented for less than \$2,500 per month. Operation and maintenance is estimated at less than \$5,000 per month. A more detailed breakdown of SVE costs will be provided.

Replenishment of Administrative Fund

The Hillsdale Trust Fund currently contains approximately \$645,000, but the administrative fund has essentially been expended. The administration fund has been reduced to \$3,850 but has accounts payable of over \$47,000 for legal services and Trustee services and expenses. The Trust expects to receive \$3,406.69 per month from renting the 215 Industrial Drive property through January 2017 but property sales, which could generate funds for the administration fund, have not been successful to date. If the administrative fund is not supplemented, the Custodial Trust will be unable to complete the purpose for which it was established and the completion of remediation of the Hillsdale sites (Industrial Dr. and South St.) per the terms of the Michigan Settlement Agreement and Custodial Trust Agreement are uncertain. In order to prevent a lapse in the remediation of the site and to ensure that the Custodial Trust's purpose is fulfilled to the greatest extent possible, the Custodial Trustee and the MDEQ have agreed that a motion should be filed with the Bankruptcy Court to amend the Michigan Settlement Agreement and the Custodial Trust Agreement to authorize the transfer of \$100,000 from the Hillsdale Trust environmental fund into the administrative fund to maintain the Administration Trust at least to the end of 2015. These monies will be used to continue un-interrupted oversight and management of the Hillsdale trust and to ensure the completion of the proposed work plan and any other response activity necessary to protect public health, safety and welfare. The Custodial Trustee and the MDEQ acknowledge and believe that even without the transfer of funds, the total funds in the Hillsdale Trust are insufficient to complete the remediation to criteria at the Hillsdale sites.

Closing

As Custodial Trustee, I appreciate the cooperation shown by the MDEQ on this issue and look forward to a mutually-beneficial resolution to this issue. Please let me know if you have any questions or need additional information.

If the foregoing correctly states our understanding, please sign below and we will attach this letter to our Motion to Approve the Transfer of Funds to the Administrative Account.

Sincerely yours,

*William L. West*  
William L. West  
BP Custodial Trustee

w/ attachment

cc: Celeste Gill w/ attachment  
M. Colette Gibbons w/ attachment  
Marty Knuth w/ attachment

APPROVED: *Susan Erickson* 4/31/2015  
Susan Erickson, Assistant Chief Date  
*Remediation + Redevelopment*  
*DMSim*

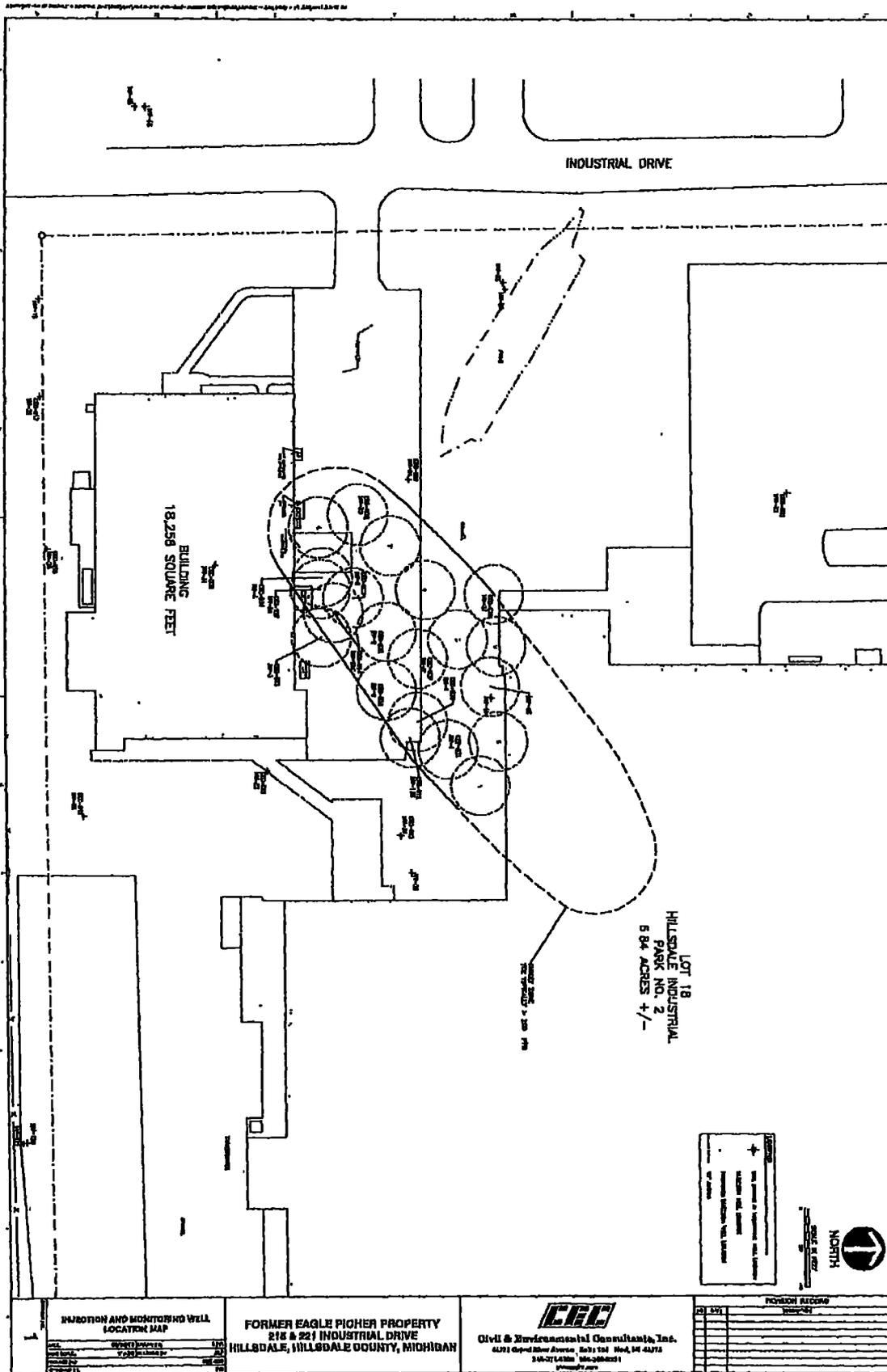
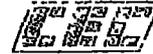


EXHIBIT 2



Civil & Environmental Consultants, Inc.

April 9, 2015

Mr. William West  
BP Custodial Trustee  
26734 Jefferson Court  
Bay Village, OH 44140

Dear Bill:

Subject: Remediation of the Hillsdale Sites  
Civil & Environmental Consultants, Inc. (CEC) Project 061-830

The following letter has been prepared at your request and with your input to explain why the funds remaining in the Hillsdale Trust Account (\$617,592) are not adequate to completely remediate contamination at the Hillsdale, Michigan sites. In the context of this inquiry, remediation is considered to be the removal of volatile organic contaminants (VOC) from both soil and groundwater to meet Federal and State standards.

In our March 17, 2015 meeting with the Michigan Department of Environmental Quality (MDEQ), the MDEQ agreed, due to the limited amount of funds remaining in the Hillsdale Trust Account, to a 2015 Work Plan that would focus remedial efforts on the groundwater contamination plume between the buildings on the 215 and 221 Industrial Drive properties (see attached drawing). This area is defined by ground water concentrations of TCE exceeding 200 parts per billion (ppb). It is estimated that the proposed work will cost approximately \$482,500 as described below. However, it may cost more if complications arise or unexpected conditions are discovered.

The 2015 Work Plan provides for an initial round of groundwater remediation in the source area in the second quarter of 2015 using enhanced biodegradation techniques (in situ treatment) followed by a second round of in situ treatment in the fourth quarter of this year. The estimated cost for these treatments is approximately \$430,000. This method has shown good results at another BP Trust site with the same VOC contamination in bedrock. In addition, the Work Plan envisions the operation of a soil vapor extraction (SVE) system in the source area in 2015 for six months at a cost of \$52,500. CEC believes that the SVE will have to be operated for longer than six months to fully address the contamination in the soil.

The existing groundwater contamination plume extends outside the area covered by the Work Plan on the property and from the 215/221 Industrial Drive site toward the northeast approximately 1850 feet. Due to the complexity of the geology underlying the area, any effort to extend the remediation to areas outside of the source area covered by the Work Plan to the remaining plant property, would likely require the drilling of up to 20 or more additional injection wells at a cost of \$4,000 per well (\$80,000 for 20 wells) plus the cost of injection for treatment (\$250,000) for an additional cost total of \$330,000. The amount could possibly be

Mr. William West  
CBC Project 061-830  
Page 2  
April 9, 2015

greater since it does not include the cost to secure access and perform remediation on private property in order to implement any off-property work. When this amount is added to the \$482,500 required to address core area contamination, it obviously exceeds the amount available in the Hillsdale Trust Account.

As you know, the Hillsdale Trust Account is intended to address both the Industrial Drive site and the South Street site. We are attempting to complete the South Street project by providing a risk-based report to MDEQ that will preclude the need, and thus the expense, of performing any active remediation at the site. Even if this approach is acceptable to MDEQ, preparation of this report will require the use of funds from the Hillsdale Trust Account. If this approach is rejected by MDEQ and some level of active remediation is required, the Hillsdale Trust Account will be further depleted, leaving less money available to address the Industrial Drive site.

In conclusion, we estimate that the minimum amount needed to fully address the contamination at the Hillsdale properties is \$812,500 which is well beyond the current balance of \$617,592 in the Hillsdale Trust Account. Further, this amount does not take into consideration additional costs associated with obtaining access to, and remediating other properties; operation of a SVB system beyond 2015; preparation of a risk-based report for the South Street site; or possible active remediation of the South Street site.

I hope that this letter fulfills your immediate needs. Please call if you have any questions or need further clarification.

Very truly yours,

CIVIL & ENVIRONMENTAL CONSULTANTS, INC.



Martin C. Knuth, P.G.  
Vice President

061-830-L-Remediation-4-9-15/P